No. 85-1563

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

REPLY BRIEF

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ARGUMENT

I

THIS CASE CLEARLY PRESENTS A FEDERAL QUESTION

Initially, Amicus curiae in support of respondent Brown argues, and respondent Brown suggests, the California Supreme Court decided the issue regarding the giving of an instruction advising the jury not to be swayed

by mere sympathy on independent state grounds and this Court thus should not review the decision. (Amicus Brief, p. 9; RB 10, fn 2.)

This argument is made although the Chief Justice in his order staying enforcement of the judgment expressly found a federal question was presented. (See California v. Brown (1986) ___ U.S. ____ [89 L.Ed.2d 702].) Moreover, the California Supreme Court expressly found the giving of the instruction in this case violated federal constitutional law. (People v. Brown (1985) 40 Cal.3d 512, 53.) Since the California Supreme Court expressly concluded the giving of the instruction violated the federal Constitution, this issue certainly presents a federal question for this Court to review. (See generally, Michigan v. Long (1983) 463 U.S. 1032, 1039-1043.)

Even assuming arguendo this Court concludes the case was not fully decided under principles of federal constitutional law, it certainly was decided primarily on federal constitutional law or was interwoven with federal constituitional law. Under these circumstances this Court still has the authority to review the decision of the California Supreme Court. (Michigan v. Long, supra, at pp. 1040-1041.)

II

AN INSTRUCTION ADVISING THE JURY NOT TO BE SWAYED BY MERE SYMPATHY DOES NOT VIOLATE THE UNITED STATES CONSTITUTION BECAUSE THE FEDERAL CONSTITUTION DOES NOT REQUIRE THE JURY CONSIDER MERE SYMPATHY WHEN DETERMINING WHETHER TO IMPOSE THE DEATH PENALTY

Respondent argues he was entitled to have the jury's consideration of his mitigating background and character evidence, but the instruction advising the jury not to be swayed by

sympathy precluded such consideration. (RB 10.) This argument is incorrect.

A. Petitioner's Position

At the outset it must be noted respondent Brown misunderstands the position of petitioner, the State of California, in this case. He argues the jury should be permitted to consider sympathy in determining the appropriate punishment. He further asserts that the only difference between the position of petitioner and respondent is that petitioner, the State of California, believes the sympathy must be related to the offense and the offender, i.e., tethered to the facts of the case. His entire brief then flows from this faulty premise.

The State of California takes the position the instruction advising the jury not to be swayed by mere sympathy is consistent with the federal Constitution.

This is so because the instruction does not preclude the jury from considering valid mititgating factors, but advises the jury not to be swayed by simple emotions such as sentiment, sympathy, public opinion, prejudice, etc. Nothing in the United States Constitution requires a jury to consider such emotional factors in determining whether death is the appropriate punishment. (See Rehnquist, J. dissenting, Caldwell v. Mississippi (1985) ___ U.S. ___ [86 L.Ed.2d 231, 252].)

Lockett v. Ohio (1978) 438 U.S. 586 and Eddings v. Oklahoma (1982) 455 U.S. 104, require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any circumstance of the offense that the

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defendant proffers as a basis for a sentence less than death.

Sympathy, however, is not a factor that relates to the offense or the offender, but is an emotion of the jury that really has no place in the sentencing process. (See Mosk, J. dissenting, in People v. Lanphear (1984) 36 Cal.3d at pp. 163, 170.) Indeed, the American Civil Liberties Union in support of Brown agrees sympathy is not a mitigating factor, but an emotion (Amicus Brief, p. 15). (But see, Gardner v. Florida (1977) 430 U.S. 349, 358 [emotion has no place in the decision to impose death].)

Thus, the State of California could properly and consistently with the United States Constitution have the jury instructed not to be swayed merely by

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sympathy in determining whether to impose the death penalty.

The problem with letting the jury be "swayed" by sympathy is that it is all too often a two edged sword. If the jury can be swayed by sympathy, it can also be swayed by a lack of sympathy for the offender because he is not good looking, does not speak well, or is of the wrong racial, ethnic or religious persuasion. Thus, telling a jury to be swayed by sympathy or raw emotion is more than likely to work against the defendant in a capital case than for the defendant. In addition, blind sympathy could be engendered for the victims as well as for the defendant. (See Mosk, J. dissenting, People v. Lanphear, supra, 36 Cal.3d at P. 170.)

Consequently, the instruction correctly, and in accord with the federal

Constitution, advises the jury not to be swayed by sympathy or other emotions such as passion, prejudice, public opinion, or public feeling. The jury is to analyze the facts of the case and the circumstances relating to the offender.

B. Decisions of This Court

Respondent cites to various cases of this Court which he claims indicate the jury is to consider sympathy and mercy. These cases include Witherspoon v. Illinois (1968) 391 U.S. 510, 519; McGautha v. California (1971) 402 U.S. 183; and Andres v. United States (1948) 333 U.S. 740. However, these cases were decided before Furman v. Georgia, supra, 408 U.S. 28 and Gregg v. Georgia (1976) 428 U.S. 153 which indicated a jury was not to have unlimited discretion in determining the appropriate penalty.

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Respondent further cites to cases such as Zant v. Stephens (1983) 462 U.S. 862, 900; Caldwell v. Mississippi (1985) ____ U.S. ____[86 L.Ed.2d 231]; and Turner v. Murray (1986) ___ U.S. ____ [90 L.Ed.2d 27, 35], for the proposition the jury had discretion to determine the appropriate penalty and this is a subjective decision.

Petitioner agrees with the proposition that a jury has some discretion in determining the penalty. However, as this Court has noted in Turner v. Murray, supra, the capital sentencer is to weigh "relevant mitigating evidence before deciding whether to impose the death penalty. . . ." (Turner v. Murray, supra, 90 L.Ed.2d at p. 35.) Yet, since sympathy is not a relevant mitigating factor upon which a jury is to base its discretion, the state may preclude the

jury from considering sympathy in determining whether to impose the death penalty.

Furthermore, while the final decision of the trier of fact can be merciful or a sympathetic response to relevant evidence, the state may properly decide a jury should not make its decision based upon mere sympathy or mercy which are not relevant mitigating factors.

C. Interpretation of the Instruction by the California Supreme Court

Respondent further argues that the State of California has simply chosen to interpret the instruction differently than the California Supreme Court and the interpretation of the instruction by that court should be followed.

However, the issue here is not one of statutory construction of a factual

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finding, but whether the instruction by telling the jury not to be swayed by mere sympathy precluded the jury from considering a valid mitigating factor under the federal Constitution. This is a matter for this Court to ultimately determine. (See e.g., Sandstrom v. Montana (1979) 442 U.S. 510, 516.)

Moreover, the decisions of the California Supreme Court regarding this instruction are hardly persuasive. People v. Polk (1965) 63 Cal.2d 443; People v. Bandhauer (1970) 1 Cal.3d 609 and People v. Vaughn (1969) 71 Cal.2d 406, 422, were decided when California law gave the jury absolute discretion in determining the penalty. (People v. Friend (1957) 47 Cal.2d 749, 765-768.) Such standardless sentencing schemes were declared unconstitutional in Furman.

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Cases such as People v. Easley (1983) 34 Cal.3d 858, 876 and People v. Lanphear (1984) 36 Cal.3d 136, which were decided after Furman and Gregg also are of little assistance since this Court has granted certiorari to examine whether the California Supreme Court has correctly concluded the giving of the no-sympathy instruction violates the federal Constitution.

Indeed, this case is remarkably similar to California v. Ramos (1983) 463 U.S. 992. There the jury was instructed regarding the governor's power to commute a sentence of life without possibility of parole. The California Supreme Court examined the instruction and concluded the effect of the instruction was to

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deflect the jury from considering the offense and the offender and instead focused the jury onto matters that had no place in a capital sentencing determination. (Id., at p. 996.)

This Court then examined the same instruction and concluded it did not have an unconstitutional affect on the jury, but let it consider relevant matters. (California v. Ramos, supra, 463 U.S. at pp. 1001-1005.)

In Ramos, this Court concluded it had the authority to evaluate the impact of an instruction on jurors and to determine whether the instruction unconstitutionally affected the jury's determination of the appropriate penalty.

This is precisely the same function that it to occur here. This Court is again being asked to determine

whether an instruction results in a decision to impose the death penalty that cannot pass constitutional muster.

Consequently, this Court need not defer to the California Supreme Court to determine the affect of CALJIC No. 8.84 on the penalty determination. (Sandstrom v. Montana, supra, 442 U.S. at p. 516.)

D. Arguments of Counsel

Both respondent and amicus for respondent, the American Civil Liberties Union, intersperse their briefs with comments about the argument made by the prosecutor in this case and arguments made by prosecutors in other cases. (See RB appendix.)

However, discussion of these arguments is misleading as they have nothing to do with this case. When this Court granted certiorari in this case the

order specified that certiorari was granted limited to Question 1 presented by the petition. Question 1 of the petition was limited solely to the constitutionality of the instruction at issue here (54 USLW 3793.)

The issue thus is whether the instruction as given here is constitutional on its face and not whether various types of argument made by prosecutors concerning sympathy are proper.

In any event, it should be noted the prosecutor simply advised the jury consistent with the instruction to decide the case on the law and not be swayed by sympathy for or against the defendant, his family, or the victim's family. (JA 92-94.)

E. <u>CALJIC No 8.84.1 Allows the Jury to Consider All Relevant Mitigating Factors</u>

Respondent also takes issue with the position of the State of

California that the giving of CALJIC No. 8.84.1 permitted the jury to consider all relevant mitigating factors.

Respondent also notes the California Supreme Court has observed the instruction may well preclude the jury from considering a defendant's background and character evidence. (People v. Easley, supra, 34 Cal.3d at p. 858.) Respondent Brown then argues the interpretation of the instruction by the California Supreme Court should be followed. (RB 19-22.)

There are several answers to this suggestion. First, the court was not interpreting a statute under state law or making a factual finding. Rather, the court was explaining what effect the instruction would have upon a jury and whether this instruction would thereby violate the United States Constitution. However, this is a matter for this Court

to determine. (Sandstrom v. Montana, supra, 442 U.S. 510, 56.)

Furthermore, this Court has already essentially held the language of CALJIC No 8.84.1(k) is consistent with federal constitutional law and the decision of this Court certainly is controlling over the decision of the California Supreme Court.

CALJIC No. 8.84.1 contains the same language as Penal Code section 190.3 which sets out the aggravating and mitigating factors the jury is to consider at the penalty phase.

In California v. Ramos, supra, 463 U.S. at p. 1105, fn. 19, this Court expressly held Penal Code section 190.3 permits the defendant to present any evidence to show that the penalty less than death is appropriate and met the requirements of Lockett v. Ohio, supra, 438 U.S.

586. If Penal Code section 190.3, subdivision (k) meets the standards set in Lockett, supra, the same language in CALJIC No. 8.84.1 also must meet these standards. (See too, Pulley v. Harris (1984) 465 U.S. 37, 53 [1977 California death penalty law with similar provisions held constitutional].)

In addition, a reading of the language of CALJIC No. 8.84.1(k) compels rejection of the position of the California Supreme Court as subdivision (k), like the other provisions of CALJIC No. 8.84.1, does not limit the jury to a consideration of mitigating factors only relating to the offense, but allows consideration of mitigating factors relating to the offender as well. (Petitioner's Brief, pp. 54-58.)

Accordingly, because the giving of CALJIC No. 8.84.1 permitted the jury

to consider any mitigating evidence relating to the offense and the offender, and the instruction advising the jury not to be swayed by mere sympathy, merely advised the jury not to decide the case based upon irrelevant emotions, but on the facts of the case and matters relating to the offender, the giving of that instrution did not violate the federal Constitution.

This was consistent with the decision of this Court in Gardner v. Florida (1977) 430 U.S. 349, 358, that

> "[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Emphasis added.)

* * * * *

CONCLUSION

For all the foregoing reasons Petitioner State of California respectfully requests the judgment of the California Supreme Court be reversed insofar as it reverses the penalty of death and that the cause be remanded to that Court for further proceedings.

Respectfully submitted,

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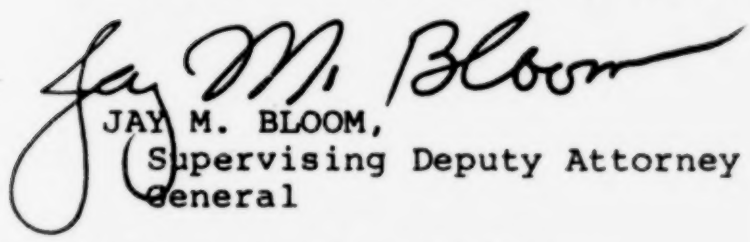

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PEOPLE OF THE STATE OF CALIFORNIA,

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ALBERT GREENWOOD BROWN

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 19 day of November, 1986.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 19, 1986.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 19th day of November 1986.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1990